

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**[2016] NZEmpC 151  
EMPC 138/2016**

IN THE MATTER OF a charging document issued under  
Employment Relations Act 2000, s 235(1)

BETWEEN DARREN BRETT CARR, LABOUR  
INSPECTOR  
Prosecutor

AND VISHAAL KUMAR SHARMA  
Defendant

Hearing: 14 September 2016  
(Heard at Hamilton)

Appearances: S Blick, counsel for prosecutor  
S McKenna and J Alchin-Boller, counsel for defendant

Issued: 17 November 2016

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**SENTENCING NOTES OF JUDGE M E PERKINS**

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[1] Vishaal Kumar Sharma has pleaded guilty to one charge brought under s 235(1) of the Employment Relations Act 2000. In summary this is a charge of obstructing, delaying, hindering or deceiving a Labour Inspector in the course of his duties without reasonable cause.

[2] As a result of the guilty plea, Mr Sharma is deemed to have committed an offence and upon conviction he is liable to be fined in a sum not exceeding \$10,000.<sup>1</sup>

[3] When the charge was first laid, Mr Sharma entered a plea of not guilty and the matter was set down as a defended hearing in the Employment Court

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<sup>1</sup> Employment Relations Act 2000, s 235(2).

in Hamilton on 14 September 2016. At the hearing, Mr Sharma was represented by counsel. Following the giving of evidence by the Labour Inspector and following the lunch break on the first day of the hearing, Mr Sharma indicated that he changed his plea from not guilty to guilty.

[4] Following the entry of the plea of guilty, the proceedings were adjourned to enable counsel to present written submissions on sentencing. Mr McKenna, counsel for Mr Sharma, also indicated at that point that the defendant intended to make an application for a discharge without conviction. The further purpose of the adjournment was to enable such an application to be made, together with the filing of accompanying documents.

[5] That application has been made and responded to by the prosecutor. Both counsel have set out matters for the Court to take into account in the sentencing process and in consideration of the application for a discharge without conviction. Mr Sharma has sworn and filed an affidavit in support of his application. An affidavit sworn by an employee involved in this matter has also been filed by the prosecutor.

[6] For the purposes of sentencing Mr Sharma, the prosecutor has provided a summary of facts. These are set out as follows:

## **SUMMARY OF FACTS**

### **Vishaal Kumar Sharma**

1. The Defendant, Vishaal Kumar Sharma, is the sole director and shareholder of a registered company called Cheap Deals on Wheels Limited. He has been registered as its director and shareholder as from 30 June 2015. Its registered office is at 92 Avalon Drive, Nawton, Hamilton.
2. The Defendant is also the joint director and the sole shareholder of a registered company called Direct Auto Importers (NZ) Limited. The Defendant was appointed a director on 8 June 2012, and has been its shareholder since 30 July 2012. Its registered office is at 90 Avalon Drive, Nawton, Hamilton.
3. The addresses of 88-92 Avalon Drive, Nawton, Hamilton ('the site') operate as commercial premises, predominantly as

a car yard for selling motor vehicles, trading as "Cheap Deals on Wheels".

4. At least four other companies have their registered offices at the site, including one called Venus Finance Limited.
5. On 22 January 2016 a complaint was received by the Ministry of Business, Innovation and Employment from Mr Suraj Sharma stating he was a former employee of Cheap Deals on Wheels Limited. He stated he had not been paid properly and that he had been working approximately 60 hours per week for his employer. Darren Brett Carr ('the Labour Inspector'), who holds a warrant of designation pursuant to section 223 of the Employment Relations Act 2000 ('the ERA'), was allocated the complaint to investigate.
6. At approximately 10.10am on 27 January 2016 the Labour Inspector carried out a workplace visit at the site. Upon arrival at the site office the Labour Inspector identified himself to the Defendant and produced his Labour Inspector warrant of designation. The Labour Inspector advised the Defendant that as a Labour Inspector appointed under section 223 of the ERA, an investigation into compliance of minimum code employment legislation would be undertaken.
7. The Labour Inspector asked the Defendant how long he had been an employer. The Defendant responded "about one and a half years". When asked about his hours of work, the Defendant stated he worked 8.30am to 5.30pm Monday to Friday, and 9am to 5pm on Saturdays and Sundays.
8. The Labour Inspector then spoke to a number of workers at the site, including a person identifying herself as Sukhpreet Kaur.
9. When he returned to the site office, the following exchange occurred between the Labour Inspector (asking the questions) and the Defendant (answering them):

*Q: Do you know Suraj Sharma? [The Labour Inspector then showed the Defendant Suraj Sharma's name in writing from the Labour Inspector's file]*

*A: This person has never worked for me*

*Q: Do you know him?*

*A: Yes he was a friend of Preet*

*Q: Who is Preet?*

*A: The first who showed you around*

*Q: Suraj has claimed he has worked as an employee for you are you sure he has never done any work for any of your companies?*

*A: Yes he has not worked here. He had visited here to help Preet that's all.*

10. The Labour Inspector then advised the Defendant that if it is later established that this person was employed and had worked for the Defendant under any of the companies, then his denial of this would be deemed as obstruction as his action would be deceiving a Labour Inspector.

11. The following exchange then occurred:

*Q: Do you understand?*

*A: Yes.*

12. The Labour Inspector then advised the Defendant to check his records and confirm that this is the case. He then stated he would be providing a letter and notice requiring the Defendant to produce wages and time records, holiday records and employment agreements.

13. At approximately 11.15am on 29 January 2016 the Labour Inspector personally served on the Defendant a letter and formal Notice requiring the Defendant as director of Cheap Deals on Wheels Limited and Direct Auto Importers (NZ) Limited to produce full wage and time and holiday and leave records, employment agreements and any other documentation recording the remuneration of four identified employees, including Suraj Sharma.

14. The Notice required a copy of the full records to be produced to the Labour Inspector by 3.00pm on 11 February 2016.

15. On the afternoon of 29 January 2016 the Labour Inspector received, via email from Suraj Sharma, a copy of a letter of offer of employment, and a copy of an individual employment agreement along with a document entitled "Schedule A - Summary of Terms and Conditions of Employment". Relevantly:

a. The letter of offer, dated 4 October 2015, was on Cheap Deals on Wheels Limited letterhead, offering Suraj Sharma the position of Assistant Manager. The letter was signed stating it is from "Vishaal Kumar Sharma Managing Director". It was also signed by Suraj Sharma accepting the offer, dated 19 October 2015;

b. The employment agreement identified the parties to the agreement as Cheap Deals on Wheels Limited (as employer), and Suraj Sharma (as employee). The

employment agreement was signed by the employee, and held a signature on behalf of Cheap Deals [on] Wheels Limited dated 19 October 2015;

- c. The "Schedule A" document identified the same parties and outlined the position description of the full time Assistant Manager role. It stated that the Assistant Manager would be responsible to "Vishaal Kumar Sharma – Managing Director".
16. On the same afternoon, the Labour Inspector also received via email a copy of a bank statement from Suraj Sharma identifying bank deposits with "commission advance" references from "Venus Finance", and "commission" from "Cheap Deals on Wheel" between 30 October 2015 and 10 December 2015. He also received some names and numbers of customers, whom Suraj Sharma stated he had served whilst working at Cheap Deals on Wheels.
17. On 11 February 2016 a letter Signed by "V Sharma", Director of Direct Auto Importers (NZ) Limited, was received at the office of the Labour Inspector. The letter advised Suraj Sharma was never employed by Direct Auto Importers (NZ) Limited. It stated "the company" had offered Suraj Sharma a retainer of \$300 per week for 5 days plus commission on the sale of motor vehicles. It also stated Suraj Sharma had agreed to work as a trainee for two weeks, and that he was "finally" offered employment but for reasons unknown he did not take up the offer. Records accompanied the letter including:
  - a. Copies of five handwritten "Tax Invoice" statements purporting to be from Suraj Sharma to Direct Auto Importers (NZ) Limited, requesting payments for retainer and commission for sales of motor vehicles. The statements are dated 16 October 2015, 23 October 2015, 15 October 2015, 4 December 2015, and 10 December 2015.
  - b. Copies of diary pages containing handwritten notes on dates between 16 October 2015 and 29 November 2015, identifying retainers and commissions, and other work matters referencing Suraj Sharma.
18. On 24 February 2016 the Labour Inspector revisited the site. During his visit he directed the Defendant to provide original wages and time and holiday records for the identified employees, the original Tax Invoice book and original diary relating to Suraj Sharma's work, and the other records that had not been provided pursuant to the Notice issued on 29 January 2016.
19. The Defendant advised that the Tax Invoice book and diary could be "at home". When shown a copy of the Tax Invoice statements and diary pages by the Labour Inspector, the

Defendant stated that the handwriting within them, and the diary, was his.

20. On 24 February 2016, the Labour Inspector personally served a letter on the Defendant advising that his actions as Director of both Cheap Deals on Wheels Limited and Direct Auto Importers (NZ) Limited, in failing to provide all the full records and misleading the Labour Inspector, have been determined by the Labour Inspector to be obstruction under section 235 of the ERA.
21. The Labour Inspector then requested a formal interview as part of the investigation, and advised the Defendant he would be entitled to have a support person present.
22. On 3 March 2016 the Defendant was interviewed by the Labour Inspector at the Labour Inspectorate offices at 430 Victoria Street, Hamilton. At the commencement of the interview the Defendant was reminded that any person commits an offence under section 235 of the ERA who, without reasonable cause, obstructs, delays, hinders, or deceives or causes to be obstructed, delayed, hindered, or deceived any Labour Inspector while lawfully exercising or performing any power, function or duty.
23. The Defendant produced the original diary pages requested on 24 February 2016, torn from an actual diary. The original diary was not produced. The Defendant advised that the diary was his father's diary and that it was his father's handwriting, not his as advised on 24 February 2016.
24. The Defendant also produced the Tax Invoice Book containing invoices relating to Suraj Sharma. He advised that the invoices were written by his father under the Defendant's instructions.
25. The Defendant was shown [a] copy of the letter of offer of employment and employment agreement supplied by Suraj Sharma. The Defendant acknowledged that the letter of offer and employment agreement was from Cheap Deals on Wheels Limited, and that they were signed by him. The Defendant advised that Suraj Sharma began his training as a "trainee" on 5 October 2015.
26. The Defendant was also shown a copy of the bank statement supplied by Suraj Sharma identifying bank deposits references to "Venus Finance" and "Cheap Deals on Wheel". The Defendant advised that an "advance" from Venus Finance Limited was made to Suraj Sharma because there were not enough funds in Cheap Deals on Wheels Limited's account for his retainer and commission. The Defendant confirmed Suraj Sharma was working for Cheap Deals on Wheels when he was earning the retainer, and commissions were paid.

27. Suraj Sharma states he worked at the site from 4 October 2015 until 7 December 2015, six days per week from 8.30am to 6pm.

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[7] While the entire sequence of events in this matter is set out in the summary of facts, the actual allegation of offending by Mr Sharma in this matter is put into context by the following exchange I had with the Labour Inspector at the hearing following cross-examination and re-examination:

**QUESTIONS FROM THE COURT: 12.44.55**

Q. Just going back to tab 6, bottom of the page, you finished with Emma and then you questioned *Do you know Suraj Sharma? Showed him front of file.*

A. Correct.

Q. What file was that?

A. That was the document file cover sheet that we have, that I took with me at the time.

Q. Okay, so that's your file for Suraj Sharma?

A. It's the file, the complaint file, yes.

Q. And the answer *This person has never worked for me* and so you questioned him *Do you know him?* Because that was your first question *Do you know him?*

A. Correct.

Q. *Yes he was a friend of Preet.* And then you talked about who Preet is and then *Question – Suraj's claimed he has worked as an employee for you. Are you sure he had never done any work for any of your companies? Answer – Yes. He has not worked here. He had visited here to help Preet, that's all.*

A. Correct.

Q. Now those statements, are they the statements you rely on to substantiate the charge that you are bringing against Mr Sharma?

A. Correct.

Q. Those statements? There's no other allegation of obstruction or omission or whatever?

A. No sir.

Q. And are you saying that these statements amount to an omission?

A. Yes.

Q. That may be a legal question, I'm not sure. But is that what you're saying?

A. Correct.

[8] A preliminary issue which arises in this matter, relating both to the substantive sentencing and more particularly to the application for a discharge without conviction, is whether the Sentencing Act 2002 applies to sentencing for offences committed under the Employment Relations Act 2000. As this is the first time such a prosecution has come before the Court a consideration of the issue is necessary.

[9] Section 3 of the Sentencing Act 2002 provides:

**3 Purposes**

The purposes of this Act are—

- (a) to set out the purposes for which offenders may be sentenced or otherwise dealt with; and
- (b) to promote those purposes, and aid in the public's understanding of sentencing practices, by providing principles and guidelines to be applied by courts in sentencing or otherwise dealing with offenders; and
- (c) to provide a sufficient range of sentences and other means of dealing with offenders; and
- (d) to provide for the interests of victims of crime.

[10] Section 4(1) of the Sentencing Act defines “court” as meaning any court exercising jurisdiction in criminal cases.

[11] A decision needs to be made as to whether, in the present case, the Employment Court is exercising jurisdiction in a criminal case. The words “criminal case” is not defined in any statute. In *Words and Phrases legally defined*, the words “criminal proceeding” are defined thus:<sup>2</sup>

**CRIMINAL PROCEEDING**

‘It seems to me that the true test is this, if the subject-matter be of a personal character, that is, if either money or goods are sought to be recovered by means of the proceeding—that is a civil proceeding; but, if the proceeding is one which may affect the defendant at once, by the imprisonment of his body, in the event of a verdict of guilty, so that he is liable as a public offender—that I consider a criminal proceeding. Undoubtedly informations by the Attorney-General for

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<sup>2</sup> John B Saunders *Words and Phrases legally defined* (3rd ed, Butterworths, London, 1988) vol 1 at 380.

smuggling have not been deemed criminal proceedings, but rather in the nature of civil proceedings.’ *A-G v Radloff* (1854) 10 Exch 84 at 101,102, per Platt B

[The judges differed in this case, the Court being equally divided. Platt B’s judgment was, however, confirmed in *A-G v Bradlaugh* (1885) 14 QBD 667.]

‘Wherever a party aggrieved is suing for a penalty, where the proceeding can be treated as the suit of the party,—as, for instance, an application for an order in bastardy,—the proceeding is a civil one, and the defendant is a competent witness. But when a proceeding is treated by a statute as imposing a penalty for an offence against the public, the amount of which penalty is to be meted by the justices according to the magnitude of the offence, there can be no doubt that the proceeding is a criminal one.’ *Parker v Green* (1862) 2 B & S 299 at 311, per Crompton J

[12] *Smith and Hogan’s Criminal Law* sets out some practical tests in the following paragraphs:<sup>3</sup>

From time to time, the courts have found it necessary to determine whether particular proceedings are criminal or not. Before the Criminal Evidence Act 1898, the defendant could not give evidence on oath on his own behalf in a criminal case whereas (since the Evidence Act 1851) he had been able to do so in a civil action. If he wished to give evidence the nature of the proceeding had to be ascertained. The same problem could arise today if it were sought to *compel* the defendant to give evidence.

This problem arose frequently under legislation that provided that no appeal should lie to the Court of Appeal ‘in any criminal cause or matter’. The question whether a particular proceeding as a criminal cause or matter frequently came before the Court of Appeal and the House of Lords. The test which was regularly applied was whether the proceedings may result in the punishment of the offender. If they may, then it was a criminal proceeding. As a practical test, this seems to work well enough. However, it must always be remembered that it is a rule with exceptions, because some actions for penalties are undoubtedly civil actions, and yet they have the punishment of the offender as their objective; for this reason the test of punishment is jurisprudentially unsatisfactory.

The meaning of punishment itself is not easy to ascertain; for the defendant in a civil case, who is ordered to pay damages by way of compensation, may well feel that he has been punished. It has been suggested that:

What distinguishes a criminal from a civil sanction and all that distinguishes it ... is the judgment of community condemnation which accompanies and justifies its imposition.

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<sup>3</sup> David Ormerod and Karl Laird *Smith and Hogan’s Criminal Law* (14th ed, Oxford University Press, London, 2015) at 14–15 (citations omitted).

According to this view it is the condemnation, plus the consequences of the sentence—fine or imprisonment, etc—which together constitute the punishment; but the condemnation is the essential feature. From this, it is argued that we can say readily enough what a ‘crime’ is:

It is not simply anything which the legislature chooses to call a ‘crime’. It is not simply anti-social conduct which public officers are given a responsibility to suppress. It is not simply any conduct to which a legislature chooses to attach a ‘criminal’ penalty. It is conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community.

But if ‘the formal and solemn pronouncement’ means the judgment of a criminal court (and what else can it mean?) we are driven back to ascertaining whether the proceeding is criminal or not. How is the judge to know whether to make ‘solemn and formal pronouncement of condemnation’ or to give judgment as in a civil action? Surely, only by ascertaining whether the legislature (or the courts in the case of a common law crime) have prescribed that the proceedings shall be criminal; and this must depend, primarily, upon whether it is intended to be punitive.

(Emphasis as in original)

[13] *Smith and Hogan’s Criminal Law* also gives a helpful statement in its conclusion:<sup>4</sup>

Readers will by now have realized that the task of defining ‘crime’ by reference to a universal purpose for criminalization or by identifying some universally accepted ingredients such as public wrongs and harms would be extremely difficult. There is no sufficient agreement as to what these purposes or ingredients are. The best that can be offered in practical terms is to consider the trial process and likely outcomes if liability is established.

[14] Also relevant to the present consideration is the following statement from A P Simester and W J Brookbanks, *Principles of Criminal Law*:<sup>5</sup>

In addition to prohibition and punishment, a third aspect of the criminal process is the conviction itself – the type of judgment that the court makes. Convictions are the most distinctive aspect of criminal law. In particular, while it also licenses the imposition of sanctions, a criminal conviction (at least for stigmatic offences) is regarded as a penalty *in its own right*, both by legal officials, such as judges, and by the public. This is because it has the effect of labelling the accused as a criminal. A conviction makes a public, condemnatory statement about the defendant: that he or she is

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<sup>4</sup> At 16.

<sup>5</sup> A P Simester and W J Brookbanks *Principles of Criminal Law* (4th ed, Thomson Reuters, Wellington, 2012) at 4–5 (citations omitted).

blameworthy for doing the prohibited action. It is, literally, a pronouncement that he or she is “guilty”. By contrast, civil judgments seem merely to pin the salient breach on a defendant, without necessarily saying anything about his or her moral culpability. Thus, as we have noted, a plaintiff can sue for breach of contract without having to show fault by the defendant. The adverse civil verdict is made for the plaintiff’s benefit and entails no formal public censure; the adverse criminal verdict is a pronouncement made on behalf of society, and is a form of community condemnation.

This facet is not mentioned in the definition of criminal law that we proposed earlier. Rather, it is something that accompanies the procedural differences. Thus the essential distinction between criminal and civil law lies not so much in the operation as in the social significance of the criminal law – in the way criminal laws and convictions are understood. The criminal law has a communicative function which the civil law does not, and its judgments against the accused have a symbolic significance that civil judgments lack. They are a form of condemnation: a declaration that the accused did wrong. Public recognition of this fact can be seen in the relevance of the criminal law to applications for a visa, or for admission to practise as a lawyer, in which applicants are required to disclose any previous convictions. Or consider the difference between publicly denouncing someone as a “convicted criminal” and calling him or her a “tortfeasor”. The law exists in society not in the abstract. Correspondingly, the law’s labelling of a defendant as “criminal” imports all the resonance and social meaning of that term.

(Emphasis as in original)

[15] The matter is therefore not totally straightforward. However, in applying those principles to the present circumstances, there are a number of provisions in the Employment Relations Act 2000 and Employment Court Regulations 2000 (the Regulations) which point clearly to the fact that the Court is exercising jurisdiction in a criminal case in dealing with the offence to which Mr Sharma has pleaded guilty.

- (a) Section 235 of the Employment Relations Act uses the words “commits an offence”, “liable on conviction”, and “to a fine not exceeding \$10,000”.
- (b) Regulation 71 of the Regulations deals with “Prosecutions for offences”. Regulation 72 provides that the Registrar of the Employment Court is to keep “Records in respect of offences” by recording the proceedings in criminal records which must

be kept for the purposes of s 184 of the Criminal Procedure Act 2011. These records are then evidence of previous convictions.

- (c) Schedule 2 of the Regulations, containing the provisions having effect in relation to prosecutions for offences committed under the Employment Relations Act, also provides pointers. For instance the words “prosecutions for offences” are used. Proceedings are commenced by way of a “charge” and the form prescribed for commencing a charge is referred to as a “charging document”. In addition, the schedule provides the procedure whereby the decision of the Court in such a prosecution is to be recorded in criminal records by the Registrar of the Court pursuant to regs 71 and 72 already referred to.
- (d) All prosecutions are to be brought by a prosecutor. A plea of guilty or not guilty is required.<sup>6</sup>
- (e) Schedule 2, cl 18 of the Regulations provides a process where a prosecutor of an offence under the Employment Relations Act may provide proof of previous convictions. That clause also refers to “the sentence of the court in respect of the conviction”.
- (f) Of a more general nature is the fact that the Employment Relations Act and the Regulations make a clear distinction between the procedures for imposition and recovery of penalties and imposition and recovery of fines for offences committed. The former is of a purely civil nature.
- (g) No specific procedure is provided in the Employment Relations Act or Regulations for collection of fines. However,

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<sup>6</sup> See Employment Court Regulations 2000, sch 2, cl 16(1)-(3).

once a fine is imposed the Registrar will instigate enforcement procedures pursuant to s 141 of the Employment Relations Act.

- (i) Finally I have regard to the fact that it cannot have been the intention of the legislature to introduce into the Employment Relations Act a power in the Court to enter a conviction but deprive the Court of the power to consider now legislatively established sentencing principles and to discharge as part of the sentencing process.

[16] In all of these provisions in the Employment Relations Act and the Regulations, reference to the Court means the Employment Court. They are all strong indicators that in dealing with an offence, the Court is exercising jurisdiction in a criminal case. Accordingly, I am satisfied that in dealing with Mr Sharma I am permitted and indeed required to apply the Sentencing Act, and in particular have jurisdiction to consider whether he should be discharged without conviction.

[17] The next step in the process is to consider those purposes and principles of sentencing which apply in the present case as set out in ss 7 and 8 of the Sentencing Act. Counsel are generally in agreement with the matters contained in those sections which apply in the present case. Insofar as the purposes of sentencing are concerned, it is clear that Mr Sharma must be held accountable for any harm done to the community by his offending. It is also necessary to promote a sense of responsibility for, and acknowledgment of, that harm. Obviously elements of denunciation and deterrence apply. That is particularly so having regard to the fact that this is the first prosecution of its kind and it is necessary that a wider indication of deterrence is communicated to deter others from offending in the same way.

[18] Insofar as the principles of sentencing contained in s 8 are concerned, the Court must take into account the gravity of the offending in this case, particularly in considering the application by Mr Sharma for a discharge

without conviction. The elements of proportionality, consistency and imposing the least restrictive outcome are principles which need to be taken into account. Generally, however, the majority of the principles contained in s 8 do not apply in the present case.

[19] Insofar as aggravating and mitigating factors are concerned, those aggravating factors set out in s 9 of the Sentencing Act do not apply to the present case. The only matter which the Court might have needed to consider is the element of premeditation. However, in regard to the circumstances of the case, it would be difficult to say that Mr Sharma acted in the way he did through any premeditation on his part. Perhaps the seriously aggravating feature of the offending is that there was initially a strong element of deceit in the communications with the Labour Inspector. However, this was mitigated perhaps by a misguided motive of endeavouring to cover up for deficiencies in the employment process of the employee, so far as his immigration status was concerned, which Mr Sharma mentions in his affidavit. That deceit continued for a period until, through the persistence of the Labour Inspector, Mr Sharma the defendant was forced to come clean and produce details of the nature of the employment.

[20] Insofar as mitigating circumstances are concerned, Mr Sharma has no previous convictions of this type. He is of a young age and through the insolvency of his parents has been forced to take on the obligations of running the companies that provided the employment in this case. Even so he has, in the short time that he has been involved in these positions, acquired a degree of experience and responsibility in running commercial enterprises of this nature. He is a person of previous good character but demonstrated a degree of lack of judgment on this occasion.

[21] It is also a mitigating factor that having been confronted with the evidence of the Labour Inspector during the course of the hearing he immediately took steps to change his plea to one of guilty. This was not a plea entered at the earliest possible stage. The mitigatory effect is reduced as

a consequence. However, as a factor to take into account, his plea at that stage in the proceedings substantially truncated the hearing.

[22] If this matter were to be dealt with in the absence of the application for a discharge without conviction, Mr McKenna, counsel for Mr Sharma, submits that having regard to the purposes and principles of sentencing and the aggravating and mitigating circumstances, an appropriate end sentence would be a fine of \$1,600. Ms Blick, counsel for the prosecutor, on the other hand, submits that the appropriate fine would be \$6,000. That would be a substantial fine in view of the circumstances of offending for the first time and having regard to the maximum fine of \$10,000 which could be imposed in a case such as this. I would regard \$6,000 as being a manifestly excessive sentence. I find the element of proportionality needs to be taken into account and a fine at that level would be reserved for far more serious offending than that committed in the present case. A fine of that magnitude to be justified would probably involve a person who was a persistent offender and had previous convictions of this kind or relevant convictions imposed by courts of other jurisdictions. Even a fine of \$1,600, as submitted for by Mr McKenna, I would regard at the higher end of the spectrum having regard to Mr Sharma's overall culpability in this matter. In this respect I have regard to *Peter Reynolds Mechanical Ltd t/a The Italian Job Service Centre v Denyer (Labour Inspector)*.<sup>7</sup> In that case, where a fine had been imposed of \$5,500 for breach of a compliance order (although not for an offence, as occurs in the present case) the fine was reduced by the Court of Appeal to \$750. There are some similarities between that case and the present one. In that case the Court of Appeal took into account that prior to the imposition of the fine the defendant had made complete compliance of what amounted to a relatively minor breach. In the present case, apart from the clear and initial obstruction of the Labour Inspector, Mr Sharma fully co-operated to the extent of providing full documentation and undergoing an interview enabling the Labour Inspector to complete his investigation.

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<sup>7</sup> *Peter Reynolds Mechanical Ltd t/a The Italian Job Service Centre v Denyer (Labour Inspector)* [2016] NZCA 464.

[23] Even though Mr Sharma acted without judgment when initially confronted by the Labour Inspector, that was done out of a misguided sense of endeavouring to protect his employee who he suspected may have had difficulties with his visa and ability to work. As it transpired those fears were unfounded and it is to Mr Sharma's credit that when confronted with his obligations in the matter he made full disclosure, provided all documentation as requested, and participated in a full and frank interview with the Labour Inspector in the company of his legal adviser. As Ms Blick has mentioned in her submissions, the end result of the Labour Inspector's persistence ameliorated many of the consequences of the offending.

[24] Taking into account all of those factors, the end result insofar as gravity of the offending is concerned, is that it was at a low level.

[25] Turning now to the application for a discharge without conviction. Consideration of whether or not to grant a discharge without conviction involves a three stage process. As noted in the Court of Appeal in *R v Hughes*<sup>8</sup> the requirements of s 107 of the Sentencing Act are mandatory and require the Court to consider:

- (a) The gravity of the offence;
- (b) The direct and indirect consequences of a conviction;
- (c) Whether those consequences are out of all proportion to the gravity of the offence.

[26] Even if the Court determines that the consequences are out of all proportion to the gravity of the offence, the Court must still consider whether to exercise its residual discretion to grant a discharge (although, as the Court of Appeal said in *Blythe v R*,<sup>9</sup> it will be a rare case where a Court will refuse to grant a discharge in such circumstances).

[27] The Court of Appeal gave a further analysis of this approach in *Z (CA 447/2012) v R*:<sup>10</sup>

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<sup>8</sup> *R v Hughes* [2008] NZCA 546, [2009] 3 NZLR 222 at [8].

<sup>9</sup> *Blythe v R* [2011] NZCA 190, [2011] 2 NZLR 620 at [13].

<sup>10</sup> *Z (CA 447/2012) v R* [2012] NZCA 599, [2013] NZAR 142 (citations omitted).

[27] For our part, we consider that there is much to be said for the approach adopted by the Divisional Court in *A* (CA747/2010). That is: when considering the gravity of the offence, the court should consider all the aggravating and mitigating factors relating to the offending and the offender; the court should then identify the direct and indirect consequences of conviction for the offender and consider whether those consequences are out of all proportion to the gravity of the offence; if the court determines that they are out of all proportion, it must still consider whether it should exercise its residual discretion to grant a discharge (although, as this Court said in *Blythe*, it will be a rare case where a court will refuse to grant a discharge in such circumstances).

[28] The approach just outlined seems to us to fit best with the structure of s 107 and to provide the most helpful framework for analysis. While we are conscious that the Court in *Blythe* expressly disapproved it, we do not consider the approach to be wrong in principle. What we do consider to be wrong in principle is to leave the consideration of personal aggravating and mitigating factors out of the s 107 analysis and to address them only in the context of the s 106 discretion. We do not see how the disproportionality analysis required by s 107 can be undertaken without taking into account the offender's personal aggravating and mitigating circumstances. However, while consideration of these circumstances must, in our view, be carried out in the context of the s 107 analysis, whether this occurs at the first or third step of that analysis is not of great significance. Provided that all relevant factors are considered in the s 107 context, the precise point at which they are considered is unlikely to be material.

[28] This approach was followed by the Court of Appeal in *DC* (CA 47/2013) v R.<sup>11</sup>

[29] I have already given consideration to the first step in the process by having regard to the aggravating and mitigating factors of both the offending and the offender in this case. I have reached the decision that the gravity of the offending is low. The consequences to Mr Sharma of a conviction have been discussed and responded to in the submissions of counsel. In support of the application, Mr Sharma has, as already indicated, filed an affidavit that sets out his present circumstances. It has to be conceded that the consequences of a conviction on Mr Sharma are not extensive but nevertheless by inference would have an important additional consequence on the operation of his businesses and in turn could put the employment of a number of employees at risk.

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<sup>11</sup> *DC* (CA 47/2013) v R [2013] NZCA 255.

[30] The first effect, which Mr Sharma refers to in his affidavit, is a normal consequence of a conviction against someone who has offended against the criminal code. Nevertheless it is a matter to take into account in the exercise of the discretion. Mr Sharma refers to being concerned about the impact that a conviction will have on him and his career. He states that he is 22 years old and at the beginning of his business career. Mr Sharma states that a conviction would be a blot on his record and would stay with him throughout the remainder of his working life.

[31] The second consequence which he refers to has more substance. Mr Sharma states that as part of his career as a vehicle salesman he intends to move into sourcing vehicles overseas himself. This would be consistent with the operations of the businesses involved. He states that he wishes to position himself long term at the importing step of the process rather than the retail stage. To do so, he states that he will have to travel to countries where the vehicles are imported from. He is concerned that his conviction is going to restrict his ability to travel to or conduct business in those countries.

[32] As Ms Blick points out in her submissions, the evidence in respect of this particular alleged consequence is slim. She states that there is no evidence that the defendant travels overseas regularly for business – but in fact that is conceded by Mr Sharma, who indicates that it is his intention to travel overseas regularly for the purposes of sourcing vehicles for sale in New Zealand, not that he presently does so. Ms Blick refers to the Court of Appeal’s decision in *Edwards v R*<sup>12</sup> in which this type of consequence is discussed. The Court must be satisfied that there is a “real and appreciable risk that adverse consequences will ensue”<sup>13</sup> if a defendant is convicted – in this case, that overseas travel will be impeded. Ms Blick submits that Mr Sharma has failed to show a real and appreciable risk that either of the claimed consequences will ensue. Even if accepted as a risk, they do not, in her submission, establish that the consequences of a conviction outweigh the gravity of the offending.

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<sup>12</sup> *Edwards v R* [2015] NZCA 583.

<sup>13</sup> At [24].

[33] Mr McKenna in his submission puts the position this way:

**Consequences of the offending**

42. The defendant currently has no criminal history. This offence will mean that he carries with him a criminal conviction. That can have various ongoing implications for him and his career.
43. Specifically the defendant wants to move into travelling to source vehicles for import overseas. A criminal conviction will potentially limit his ability to enter some countries. For example, this conviction will make Mr Sharma ineligible for a Visa Waiver for the United States of America.
44. The conviction will not affect the Defendants Motor Vehicles sales licence and will not prevent him becoming a registered financial services provider.
45. In Counsels submission, though the direct and indirect consequences are limited the offence is minor in nature and the defendant's culpability low. It would not be inappropriate to discharge the defendant without a conviction.

[34] While, as Mr McKenna concedes, the direct and indirect consequences of a conviction are limited, his inferential point is that the gravity of the offending is minor; therefore the balancing exercise may start from a lower evidentiary threshold, which in this case can result in favour of granting a discharge. While the evidence of Mr Sharma is limited, a large number of sentencing cases presenting evidence of difficulties with travel abroad if a conviction is entered have now come before the courts. In considering such matters I can have regard to this Court's wide powers to consider evidence and information in its equity and good conscience jurisdiction pursuant to s 189 of the Employment Relations Act. I consider that it can be reasonably inferred that with a conviction against his name, Mr Sharma will experience difficulty in meeting immigration requirements when travelling to countries for the purposes of entering into reasonably substantial commercial contracts for the purchase of vehicles to be imported into New Zealand. It may well be that such difficulties will not preclude his travel, but as Mr McKenna has submitted, the element of proportionality applies to the Court's balancing process and ultimate discretion under s 107 of the Sentencing Act.

[35] *Edwards* involved far graver offending than that arising from Mr Sharma's brief initial exchange with the Labour Inspector in this case. It was that initial exchange which the Labour Inspector considered gave rise to the offence. If this were a case involving evidence of persistent offending by Mr Sharma and large scale abuse of the rights of his companies' employees, then the balancing exercise might take a different course, as the gravity of the offending would be far higher than it is in this instance.

[36] Ultimately, these factors need to be considered in the exercise of the Court's discretion under s 107 of the Sentencing Act. I accept that Mr Sharma intends to travel abroad in the course of his business. He is clearly not able to say at this stage the countries involved. It is likely they would change over time in any event. It would have been preferable to have had more evidence on the requirements of countries he proposes to visit. However, in the circumstances of this case and from the balancing exercise I undertake, I conclude that a conviction against Mr Sharma would be out of all proportion to the gravity of the offence. There are no other factors arising in this case which would affect my exercise of the Court's residual discretion. Accordingly, Mr Sharma's application to be discharged without conviction is granted.

[37] Section 106 of the Sentencing Act entitles a court discharging an offender without conviction to make an order for payment of costs. In this case, where the matter proceeded to a defended hearing and was part-heard when the plea of guilty was entered, it is appropriate that Mr Sharma makes a reasonable contribution towards the prosecutor's costs. Accordingly, I order Mr Sharma to pay costs of \$500.

M E Perkins  
Judge

Sentencing Notes signed at 11.45 am on 17 November 2016